B.

The opinion of this Court erroneously presupposes that the Commanding General judicially and judiciously determined that there was a manifest necessity for the transfer of charges—but the record, correctly appraised, establishes the non-existence of manifest necessity, that the Commander probably did not cause the transfer, and that if he did he acted not as a court of justice aware of the responsibility to petitioner and the public but as a commander presuming the unlimited power to terminate the trial at his command and convenience at any time prior to finding.

C.

The judgment of this Court deprives petitioner of the right to be heard and to offer evidence on the questions of pure fact upon which the judgment rests, to-wit: that the first order of transmittal (4th endorsement) establishes that the tactical situation required transfer of the charges, that this tactical situation was brought about by a rapidly advancing army, that the court-martial officers were needed to perform their military functions (and could not perform their judicial functions), and, perhaps, that the German witnesses could not be produced before the court-martial—which questions of pure fact were not raised in the second court-martial or in the trial court and therefore were not disproved by petitioner.

PREFATORY STATEMENT.

Innocence of Petitioner.

Petitioner's innocence cannot be inquired into on habeas corpus. However, the question of the invalidity of petitioner's conviction and sentence on the ground that

the constitutional provision against double jeopardy was violated must be examined upon the presumption that petitioner is innocent. In this case there is more than the legal presumption that the first court-martial, if permitted to complete the trial, would have acquitted. The record discloses that the second court-martial convicted by a divided vote (R. 67-68); that it acquitted Cooper who was tried for the first time in a joint trial with petitioner (who was then being tried a second time) (R. 67); that the testimony shows an obvious misidentification of petitioner and that he was not at the scene of the crime (R. 45-60).

Defense counsel appointed by the Commanding General, Fifteenth Army to defend petitioner before the second court-martial, would not have invoked the aid of the great writ of habeas corpus and continued to this date to serve him under the obligation of his appointment (without charge) had he considered him guilty of the offense. Members of the convicting court-martial were distressed at the mistake they made and sought to have the conviction set aside. Seven months before this proceeding was instituted defense counsel sought relief for petitioner in an application to the then Secretary of War and received a response thereto that the Department was powerless to vacate the judgment. This response was in evidence in the District Court.

The Supreme Court in *United States* v. *Perez*, 22 U. S. (9 Wheat) 579, 6 L. Ed. 165, states that courts should be extremely careful how they interfere with any of the chances of life in favor of the prisoner. The danger of successive trials is the risk that an innocent man will be convicted. That danger justifies the care which this case has received and will receive on this petition for rehearing.

Supreme Court of the United States

427

OCTOBER TERM, 1948.

No. 427.

FREDERICK W. WADE, PETITIONER,

VS.

WALTER A. HUNTER, WARDEN UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS, RESPONDENT.

PETITION FOR REHEARING OF PETITIONER and MOTION TO STAY MANDATE.

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A.

The tactical situation did not require the withdrawal of the charges from the first court martial as stated in the court's opinion.

What does the record show on this question? First, it shows unequivocally that no evidence was offered before the second court-martial and no contention was made at that trial that the tactical situation required the transfer (R. 68-69, 119-127). This is important since had there been such evidence then was the time and there was the place for its production. The prosecutor had known for more than two months that petitioner was claiming former jeopardy, yet he opposed the plea of former jeopardy upon the sole ground that there could be no jeopardy prior to a finding; that the commanding general had the unrestricted power to transfer the case. Under these circumstances was it necessary for defense counsel to have proved that there was no necessity for the withdrawal of the case and its transfer to another court for a trial anew? Was it the responsibility of defense counsel to have established the absence of every ground upon which the termination of the first court-martial trial would have justified a retrial without violation of the Fifth Amendment of the Constitution? If so, defense counsel would have been compelled to show the absence of countless possibilities, the non-existence of a wide variety of situations which the courts have held or might hold constitute imperious necessity for termination. The reason that neither defense counsel nor the prosecution nor the second court-martial considered the possibility that the case was withdrawn for necessitous reasons lies in an appreciation of how an infantry division operates in time of war, and how a court-martial operates in a division.

An infantry division consists of some 14,000 men, of whom about 800 are officers. It has three infantry regiments, four artillery battalions and various other units. The division commander has a large general and special staff. The division judge advocate is a member of his staff. He has an assistant, several enlisted men, and these constitute the legal department of the division. The division has some 2,000 vehicles and about ten liaison planes, but the division is not mounted. The troops march on foot. The average length of march for a division on roads is twelve to fifteen miles per day, which may be extended by forced marches perhaps to twenty-five miles per day. If the division meets resistance requiring deployment from the roads or fighting, ordinarily its daily advance is measured in yards and not miles. Foot troops do not race across country occupied by a fighting enemy. If an infantry division moves rapidly, it is riding in trucks, in which case the enemy is not opposing the movement. That a division is committed to action does not mean that its 14,000 members fight, or even that a majority of them engage in shooting the enemy. In time of war a division does not fight day after day. In a campaign it is committed and relieved, and is in action and out of action intermittently. It is not normal for a division to be in an attack situation for an extended consecutive period. An attack situation is not synonymous with a tactical situation. A division may be in a tactical situation without being in contact with the enemy. A division in time of war is in a continuous tactical situation. In military parlance the phrase "tactical situation" neither denotes nor connotes actual combat.

In military organizations the actions taken are in the name of the organization commander. This does not mean that the commander has knowledge of that which is done in his name. It is common practice for orders to be issued and endorsements made for the commanding general with-

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PETITION FOR REHEARING.

Frederick W. Wade petitions the Court for a rehearing upon the following grounds:

A.

The major premise upon which the Court's judgment is founded—that a tactical situation, brought about by a rapidly advancing army, required the withdrawal of the charges from the first court-martial—is not supported by the record and is contrary to the record, and is based upon a misunderstanding of the military situation and the way a Division court-martial functions in a military situation.

out prior knowledge or examination or consideration upon his part. Administrative matters of a routine nature are handled by the administrative staff without reference to the commander. A division, being a large unit, occupies a large area, whether it is at rest or on the march or in action. It ordinarily has several headquarters, a headquarters for conduct of tactical training or operations and a headquarters for administrative matters, such as supply, finance, personnel, military justice. The adjutant general section and the judge advocate section is at the administrative headquarters located anywhere from ten to twenty-five miles from the tactical or operational headquarters. The commanding general normally is at the tactical headquarters. The paper work is performed at the administrative headquarters. A division commander has power to appoint courts-martial and to refer cases to it for trial. However, military justice is handled by the judge advocate section and as a practical matter the judge advocate selects the members of the court and prepares the cases for it. The order appointing the court usually provides that it shall meet at a certain time or as soon thereafter as practicable for the trial of such persons as may be properly brought before it. The time and place of meeting is ordinarily determined by the president of the court in consultation with the trial judge advocate and at the convenience of members of the court. Members of the court do not devote their exclusive time to court matters, but continue to carry on their normal duties. If their services are needed elsewhere, they may be excused, or if the court has entered upon the trial of a case, the trial may be adjourned to a time convenient for the members of the court. The flexibility of courts-martial as to the time and place of meeting, continuances and adjournments, makes unnecessary the withdrawal of a case once commenced before it. A tactical situation can hardly be conceived which would require the withdrawal of a case

from a general court-martial after trial has commenced. Moreover, the members of military organizations located in Germany during the war and after the war were familiar with the progress of the war and knew that after the Battle of the Bulge, which was won in January, 1945, the "momentous issues" had been resolved and that the conclusion of the war was a matter of a short time. They knew that the success of the allied armies on both the western and eastern fronts was decisive and that the resistance of the German armies crumbled. They knew that if a court-martial trial could be conducted by the 76th Division on March 27, 1945, it certainly could be completed after that date. No tactical situation developed to prevent it.

Second, the 4th indorsement (described in the opinion as the first order of transmittal of the charges) does not indicate that the tactical situation required the transfer of the case. The only thing left to be done on March 27, 1945, was to hear the three witnesses requested by the court and to decide the case on the evidence. The trial judge advocate was responsible for the production of these witnesses, who lived in Krov, Germany, twenty-two miles from Pfalzfeld, where the court saf on that date. The court set no time or place for the production of these witnesses, leaving that to the trial judge advocate who would have consulted with the president of the court and its members to assure a convenient time and place of the meeting. We do not know what effort, if any, was made to secure these witnesses during the period March 27th to April 3rd. The indorsement recited that due to the tactical situation the distance to the residence of such witnesses had become so great that the case could not be completed within a reasonable time. "Tactical situation" clearly refers to the movement of the division, and of

course the court which adjourned the trial knew that the division would move. It had moved in the past and it would move in the future. While the location of a division cannot be pin-pointed at one place, let us assume for argument that the division was at Pfalzfeld on March 27th and at Homberg on April 3rd, eighty miles beyond Pfalzfeld. If the two or three German witnesses could be brought from Krov to Pfalzfeld, why could not they be brought from Krov to Homberg, some eighty miles farther? How much longer would it have taken the trial judge advocate to have transported two or three persons an additional eighty miles? Will this court say that this change in distance justified the transfer of the case under the doctrine of *United States* v. *Perez, supra?* Supposing in the Perez case, after the government and defense rested, the court indicated it desired three additional witnesses produced and directed the prosecutor to bring them in; that one week later the prosecutor reported to the court that the witnesses had moved in that week eighty miles farther from the court; and that thereupon the trial judge declared a mistrial and announced the case would be retried at the term of court sitting nearer the witnesses. Would not a second prosecution violate the Fifth Amendment against double jeopardy?

What is the significance of the phrase "the case cannot be completed within a reasonable time"? It is a conclusion, clearly false. To state that witnesses cannot be moved 102 miles in a reasonable time is to state a palpable falsehood. Moreover, what constitutes a reasonable time to complete the case depends upon a comparison of the length of time required to complete the case as against the length of time it would take to try the case anew at a place nearer Krov. The case was tried at Bad Neuenahr, Germany, some 45 miles from Krov, on

June 30, 1945, almost three months after the case was withdrawn. Witnesses, of course, had to be brought from the then location of the 76th Division in the Grimitchau area, some 260 miles from Bad Neuenahr, but this increased distance between court and witnesses was not a factor accounting for the lapse of time. But if distance were a true factor as asserted in the 4th indorsement, it would have been a true factor to consider in determining whether an earlier trial could be had if the case be transferred. In other words, if the distance to the residence of the German witnesses had become so great that the case could not be completed within a reasonable time at the situs of the 76th Infantry Division court, then the distance to the location of the American witnesses, members of that division, had become so great that the case could not be completed within a reasonable time at the situs of another court closer to the residence of the German witnesses. Is there any wonder that the prosecution did not attempt to prove the assertions in the 4th indorsement?

But the Court of Appeals and this Court looked beyond this specious reason assigned in the 4th indorsement and assumed that the tactical situation did more than change distances. This court stated "Momentous issues hung on the invasion and we cannot assume that these court-martial officers were not needed to perform their military functions." We do not ask this court to assume that, but we do ask the court not to assume that the completion of the case would have prevented the members of the court-martial from performing their military functions. Can this court assume upon this record that the members of the court could not have devoted the one or two hours necessary to the completion of the case on April 3, 1945, or on any day within a reasonable time thereafter? One week earlier they devoted an entire day to this case. Can

the court assume that there was a greater need for their services because progress was easier and the end of hostilities was in sight?

Certainly there is no evidence in this record from which it can be inferred that the court-marital officers could not have completed the first trial because their services were needed elsewhere. Moreover the high duty of securing justice for petitioner under the Constitution was of equal importance with the other duties imposed upon these officers.

We have demonstrated that the 4th indorsement does not establish that the tactical situation required the transfer order. What else in the record is there? There is the dissenting opinion of the assistant judge advocate general (R. 78-87). It is not evidence, but we examine it nevertheless. He suggests that the commanding general was called upon to determine "not only how these witnesses would be produced but also whether it was advisable to bring them to the place of trial"; the expediency of transferring them from their homes, a considerable distance in time of combat; feeding and billeting problems; and use of personnel in the effort (R. 84-85). He asserts that German witnesses were not subject to subpoena and that "in Germany the compulsory attendance of civilian witnesses is theoretically possible because of the overriding power of the conqueror" but "practical considerations weighed heavily against theoretical possibilities"; that "it is a matter of notorious knowledge that the ordinary means of travel in Germany were disrupted and in some areas destroyed" (R. 81-82). Anyone who served in Germany would know that these conjectures were baseless. The roads were good and open. We supplied some sixty divisions and supporting troops with supplies transported over them. German civilians were most obedient to command. There was no combat situation

between Krov and the 76th Division. In any event the problem, if any, was no different on April 3, 1945, when the case was transferred, than it was on March 27, 1945, when German witnesses were produced at the trial in Pfalzfeld.

Then there is the motion for reconsideration with attached map. It is not evidence, but we shall examine it. For brevity we will limit our examination to the map which was used by respondent at the oral argument. Demonstrably it is an amazingly incomplete and misleading document. Where were the other 59 American divisions, cavalry groups, the British, French and Russian armies? Where are the German forces, if any, that opposed (if they did) the advance of the 76th Division?

What was the enemy situation after March 27, 1945, as compared to the enemy situation before that date? Where were the various headquarters of the 76th Division, the forward headquarters and the rear headquarters? When and how did the division move? Certainly the Government must know the true facts in this case. The Government has available the daily situation reports, the after-action reports and the casualty reports of the 76th Division. The Government must know who authored the 4th indorsement and has probably obtained statements from the commanding general, division judge advocate and trial judge advocate. We do not pretend to know at this time why the case was transferred or who was responsible for its transfer. We do know it was improvidently transferred. Since the commanding general and his staff apparently assumed the unrestricted power to transfer the case without regard to the Fifth Amendment of the Constitution (the assumption relied on in the second prosecution) it can hardly be assumed that they weighed the rights of petitioner under the Constitution against the question of mani-

fast necessity and public justice. There was no legitimate reason for the transfer, but there are three possible explanations for it which may be inferred from the record. One is that the instigator of the withdrawal believed that the court-martial would not convict. Another is that the instigator did not want to try the Cooper case, a companion case, so he caused both petitioner's and the Cooper case to be transferred. The third is that the prosecutor went to Krov to check on the witnesses and recognized that the father and mother of the alleged victim were old and senile and incompetent witnesses and took the means of the transfer to avoid compliance with the order of the court.

B.

The Commanding General did not judicially or judiciously determine that there was a manifest necessity for the transfer of charges from the first court-martial.

We have already shown under Point A that the record, properly appraised, establishes the non-existence of manifest necessity and indicates that the Commanding General himself was not responsible for the content or effect of the 4th indorsement as a means of initiating a second and unlawful court-martial trial.

But assuming that what was done *for* him was done *by* him, this action was not the act of a court of justice, judicially applying the standards stated in *United States* v. *Perez, supra*.

The Commanding General appointed the court-martial and he was vested with power to review its judgments. But he was not a member of the court-martial and that tribunal, a court of justice, had exclusive jurisdiction to determine initially as the trial court whether a mistrial on the ground of imperious necessity was proper. To permit

the Commanding General to usurp this function inherent in the court is to destroy the safeguard that was petitioner's right. Courts are open and open to public scrutiny. They judge in the presence of defendant and his counsel. Not only is the Commanding General not a part of the Court but he is a part of the prosecution. He initiates the prosecution, determines in advance of reference that the case should be prosecuted. The Commanding General, Division Judge Advocate, and trial Judge Advocate are the prosecuting team. The members of the court-martial take the oath and are the impartial judges. The Commanding General takes no oath. Commanding Generals have attempted to influence courts appointed by them. So flagrant did this become that the Congress enacted Article of War 88 (10 U. S. C. A., Sec. 1560) which expressly forbids the Commanding General from censuring a court-martial with respect to any exercise of its judicial responsibility.

The Commanding General has the right to withdraw a case at any time prior to finding. But this right vests in him no power to withdraw a case for the purpose of retrial on the ground of imperious necessity or otherwise.

The Attorney General may withdraw a case from a federal criminal court. The President, the Commander-in-Chief, may order him to do so. But this does not authorize the Attorney General to exercise the judicial power to withdraw a case from a duly constituted court for the purpose of a second prosecution after jeopardy has attached, on the ground of imperious necessity.

The fact that the Commanding General "convened" the court, that is, directed that the members meet, did not place him in a position relative to the court-martial that a presiding judge holds with respect to a criminal court. We can see no analogy whatsoever.

C.

The judgment of this Court deprives petitioner of the right to be heard and to offer evidence on the new questions of pure fact upon which the judgment rests.

At the time petitioner filed his habeas corpus petition and up to a few days before the hearing he was wholly unaware that the doctrine of imperious necessity had been injected into his case on military review. The Government had refused him the opinions in his case until immediately before the trial (R. 6, Pars. 22, 34).

The 4th indorsement was not a part of the second court-martial record (R. 68-69).

As heretofore pointed out, the second court-martial denied his plea of former jeopardy on the sole ground that his first court-martial trial had not reached the finality necessary to place him in jeopardy.

At the habeas corpus trial, respondent limited the issue of imperious necessity to the question whether the combat situation in the locality of Pfalzfeld authorized the application of the doctrine (R. 40, 1). Petitioner had no notice that this unsworn, *ex parte* document (inadmissible under military law[1]) would be given the effect of a judgment.

After judgment, respondent filed its motion for reconsideration seeking permission to present evidence that the tactical situation arising in the final six weeks of the war was the cause of the withdrawal of the case (R. 26). The trial court refused to entertain this motion as coming too late (R. 31). Consequently, petitioner offered no evidence to rebut the motion.

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[1]Manual for Courts-Martial, 1928, p. 114, Par. 113b; 1949, p. 156, Par. 126b.

The Court of Appeals and now this Court have found that the tactical situation brought about by the rapid advance of the army required the withdrawal. And the Government, having discarded the point that combat prevented the completion of the court-martial trial, in its brief and oral argument, suggested that the Commanding General had the problem of weighing many factors: How the witnesses would be produced, whether it was advisable to bring them to the place of trial, distance, combat, the admonition of Theater Headquarters that the trial of certain offenses should be held in the immediate vicinity of the offenses, the problem of guarding the accused. We submit that statements of counsel are not a substitute for proof.

Petitioner concedes that he was unequal to the task of anticipating and disproving before the second court-martial matters first suggested on military review. He concedes that he was unequal to the task of anticipating and disproving in the trial court on habeas corpus matters first suggested in appellate courts.

These matters can be disproved.

Petitioner is entitled to an opportunity to disprove them. The true facts rather than assumed facts may then prevail.

CONCLUSION.

The majority opinion of the court presupposes that the commanding general withdrew the charges from the first court-martial and transferred them for the purpose of a second trial after a careful and judicial determination that the tactical situation required this action because it was manifestly necessary or the ends of public justice required it. The court states that this tactical situation was brought

about by a rapidly advancing army; that momentous issues hung on the invasion and that it cannot be assumed that the court-martial officers were not needed to perform their military functions.

But at the time the issues were made up and tried out in the trial court on habeas corpus, the Government took the position that the combat situation at Pfalzfeld, Germany, on April 3, 1945, made necessary the termination of the first court-martial trial prior to completion and limited the issue of imperious necessity to that single and simple point. However it did not prove that point and petitioner had the right to assume that the court would resolve the issue of imperious necessity against the respondent. The court did so resolve that issue. Thereafter respondent filed a motion for reconsideration in which he asked that the case be reopened for the introduction of further evidence, not upon the point that the state of combat at Pfalzfeld on April 3, 1945, prevented the completion of the first court-martial trial, but upon the ground that the rapid movement of the 76th Division in the final six weeks of the war necessitated the termination. Petitioner was not called upon to meet this new contention as the trial court refused to entertain the motion because it was filed beyond the time allowed by the rules of civil procedure. It is largely upon these new grounds that this court has affirmed the judgment of the Court of Appeals, thereby depriving petitioner of the opportunity to disprove them, an opportunity which he would have had if the trial court granted the motion for reconsideration. We believe that the record made in the trial court, interpreted with a proper appreciation of military terminology, military operations and the administration of military justice and within the confines of issues made in the trial court, requires a rehearing and a reversal of the judgment of the Court of Appeals.

However, common fairness, aside from any procedural rules, dictates that before the new issues of fact upon the question of imperious necessity—namely that the tactical situation brought about by rapidly advancing army and the possibility that the court-martial officers were needed to perform their military functions and could not complete the first court-martial trial, or perhaps that the movement of the division made it impossible or impracticable to obtain the testimony of the German witnesses—be determined against petitioner, he should be given an opportunity to be heard and to offer evidence to refute these appellate findings which he believes to be unwarranted assumptions of fact.

We respectfully submit that a remand of this case to the District Court with directions to develop and determine the facts is the only alternative to a reversal of the judgment of the Court of Appeals which will serve the ends of justice.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

We hereby certify that the foregoing petition is filed in good faith and not for purposes of vexation or delay and is believed by us to be meritorious.

R. T. BREWSTER,
N. E. SNYDER,
HARRY W. COLMERY.

MOTION FOR STAY OF MANDATE.

Frederick W. Wade moves that the mandate in this case be stayed pending the determination of the petition for rehearing.

Petitioner was released from the custody of respondent in May, 1947, and since said time has been at home with his family. He has a wife and two children, one of whom was born since his release.

Respectfully submitted,

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